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IN THE SUPREME COURT OF THE

UNITED STATES

Term,

NO. 78-1352

RUSSELL W. MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD B. MAZER
San Franciscan Penthouse
1231 Market Street
San Francisco, CA 94103
Telephone: (415) 552-6500

Attorney for Petitioner
RUSSELL W. MATTHEWS

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Attorney for Petitioner
RUSSELL W. MATTHEWS

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Petitioner, RUSSELL W. MATTHEWS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on December 21, 1978.

OPINION BELOW

The Court of Appeals entered its opinion on December 21, 1978. Said opinion appears herein as Appendix "A". Petitoner's

timely Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc was denied by order of court on February 1, 1979. A copy of said order appears herein as Appendix "B".

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals decision in the instant case in conflict with the principles ennunciated by this Court in Bronston vs. United States, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the determination of the instant case are set forth herein as Appendix "C".

STATEMENT OF THE CASE

In a three-count indictment filed on August 25, 1977, Petitioner was charged with having willfully and knowingly made false declarations to a grand jury and having made a false, fictitious and fraudulent statement to agents of the Internal Revenue Service. More particularly, the indictment alleged that the grand jury was conducting an investigation into possible violations of 18 U.S.C. §1962,[1/] and that it was material to the aforesaid investigation for the grand jury to ascertain whether or not a Mr. Donald Rassmussen had met with a Mr. Matthew Madonna in September of 1973

[1/] This statute prohibits the use or investment of income derived, directly or indirectly, from a pattern of racketeering activity in the acquisition of any enterprise which is engaged in interstate commerce.

and from whom Petitioner and Donald Rassmussen had obtained $260,000 in United States currency. Count one of the indictment alleged a violation of 18 U.S.C. §1623 based upon the following questions and Petitioner's answers which occurred during his appearance before the grand jury on or about July 18, 1974:

"Q. In September '73, did Mr. Madonna come to San Francisco?

A. Yes.

Q. Did you meet with him?

A. Yes.

Q. Do you know where he stayed?

A. Yes.

Q. Did he stay at the Stanford Court Hotel?

A. Stanford Court Hotel.

Q. Did you have a number of conversations with him at that time?

A. Yes.

Q. Was Mr. Rassmussen there?

A. No. Other members of my company

were there.? (C.T. 5)[2/]

Count Two alleged a second violation of 18 U.S.C. §1623 which occurred during Petitioner's grand jury appearance of July 18, 1974, with respect to the following questions and answers:

"Q. Do you know where Mr. Rasmussen got that money?

A. No." (C.T. 5-6)

Counts One and Two did not, however, specify in what way Petitioner's statements were false.

Count Three alleged violation of 18 U.S.C. §1001 in that during October of 1973, the Internal Revenue Service was conducting an investigation into possible violations of federal laws relating to the failure to file and/or the filing of fraudulent tax returns and that it was material to the aforesaid investigation for the Internal Revenue Service to determine the source of

[2/] Abbreviation key: "C.T."= Clerk's Transcript on Appeal; "R.T."= Reporter's Transcript on Appeal.

the $260,000 which had been in the possession of Petitioner and one Donald Rassmussen. On or about October 5, 1973, Petitioner allegedly willfully and knowingly made a false, fictitious and fraudulent statement as follows:

"Q. Where did you get the currency you deposited on the 21st of September?

A. From Don Rassmussen.

Q. Where did he obtain it?

A. I don't know." (C.T. 6-7)

The indictment alleged that the above statement was false, fictitious and fraudulent as Petitioner well knew the currency had been obtained by Donald Rassmussen from a Mr. Matthew Madonna.

Petitioner responded to the summons which he was sent, and on or about October 14, 1977, was arraigned and entered a plea of not guilty to each count of the indictment before a United States Magistrate (C.T. 8-9). On or about November 25, 1977, Petitioner moved for a dismissal or Count One of the indictment on the grounds that the questions

which formed the basis for the offense alleged therein were vague, ambiguous, and compound (C.T. 43-45). The government did not oppose Petitioner's motion to dismiss Count One of the indictment (C.T. 65-66). On December 15, 1977, Count One of the indictment was dismissed by the trial court (C.T. 94). Prior to trial, Petitioner moved, under the authority of Gebhard v. United States, 422 F.2d 281, 290 (9th Cir. 1970), that the prosecution be required to elect to try Petitioner on either Count Two or Three in that the questions and answers which formed the basis for those counts were identical (C.T. 137). The trial court denied Petitioner's motion, but stated that it would be favorably inclined to grant such a motion in the event that Petitioner was convicted on Counts Two and Three by the jury. Petitioner was tried before a jury on January 3 and 4, 1978, and was found guilty on Counts Two and Three of the indictment

(C.T. 152). On or about January 9, 1978, Petitoner moved for a judgment of acquittal on both counts on the grounds that the evidence was insufficient to support Petitioner's conviction in that the undisputed evidence at trial showed that Donald Rasmussen had obtained the $260,000 at a time when Petitioner was not physically present and that neither Rassmussen nor anyone else ever informed Petitioner of the identity of the person who physically delivered the money to Rassmussen. Thus, Petitioner's answers were literally true and under the authority of Bronston vs. United States, 409 U.S. 352, 93 S. Ct. 593, 34 L.Ed. 2d 568 (1972) and United States vs. Cook, 489 F.2d 286 (9th Cir. 1973) his convictions could not stand. Petitioner also renewed his motion to require the government to elect between Counts Two and Three of the indictment (C.T. 169-70). On February 23, 1978, the trial court

denied Petitioner's motion for a judgment of acquittal, but granted the motion for an election of counts. The government then elected to dismiss Count Three of the indictment, and the trial court ordered Count Three dismissed (C.T. 190). On February 23, 1978, judgment and sentence was imposed on Count Two of the indictment, and Petitioner was sentenced to the custody of the Attorney General for a period of three years pursuant to 18 U.S.C. §4082(a). Petitioner was ordered to be confined in a jail-type institution for a period of six months and it was further ordered that the execution of the remainder of the sentence be suspended and Petitioner be placed on probation for a period of 2-1/2 years, said probation to commence upon completion of Petitioner's term of confinement (C.T. 175). On or about February 28, 1978, Petitioner filed his Notice of Appeal (C.T. 183). Petitioner moved for bail pending appeal, and on or

about March 7, 1978, the trial court granted Petitioner's motion and ordered that he be permitted to remain at liberty upon his own recognizance during the pendency of the instant appeal.

On December 21, 1978 the Court of Appeals entered its opinion affirming Petitioner's conviction and on February 1, 1979, Petitioner's petition for rehearing and suggestion of appropriateness of rehearing en banc was denied.

STATEMENT OF THE FACTS

During 1973, Grady Hicks, Vernon Norris, Wayne Thornton, and Robert Debnam formed a management team which sought to produce an aseptic canning process based upon the patents held by a Dr. William Martin (R.T. 27). The management group, however, did not have a source of financing, and during July or August of 1973, upon the advice of Robert Debnam, Petitioner became the fifth

member of the management group, because he apparently had a potential source of financing for the enterprise (R.T. 28). During the latter part of August, 1973, the five members of the management group met at Petitioner's residence in Clear Lake, California, where they were introduced to Matthew Madonna, the individual who was Petitioner's potential source of financing for the enterprise[3/] (R.T. 29). The management group explained the aseptic canning process to Mr. Madonna and offered him 51% of the corporation stock in return for an investment of some $300,000 - $500,000

3/ Petitioner was acquainted with Matthew Madonna in that during the early part of 1973, petitioner had been employed by Mr. Madonna to supervise the renovation of Mr. Madonna's home in the New York City area.

(R.T. 30). Mr. Madonna indicated that he would consider the proposal, discuss it with his counsel, and would inform the management group of his decision at a later time (R.T. 31). Subsequently, Mr. Madonna contacted the management group and stated that he was interested in the proposal and a meeting was scheduled for September 8, 1973 to discuss the matter in further detail. At the September 8, 1973 meeting, which Mr. Madonna attended along with an attorney and an accountant, Mr. Madonna agreed to invest $250.000 in the enterprise in return for a 2/3 stock interest in the corporation (R.T. 31). At that meeting, Mr. Madonna also indicated that although he could not guarantee that he could provide additional funds for the corporation, he asked for the right of first refusal. Mr. Madonna stated that he would inform Petitioner of when the $250,000 would be available (R.T. 33). Approximately a week to

ten days after the September 8, 1973 meeting, Petitioner informed Grady Hicks that he was going to New York to obtain the funds from Mr. Madonna (R.T. 36). On or about September 20, 1973, Petitioner and one Donald R. Rassmussen flew from San Francisco to New York City, where they registered in the Alrae Hotel (R.T. 75). The following day, Petitioner visited with a number of individuals with whom he was acquainted in the New York City area, and upon his return to the hotel, was shown an attache case by Rassmussen containing a large sum of money in United States currency (R.T. 76). Petitioner testified before the grand jury that he did not know, and that Rasmussen never informed him, where Rassmussen had obtained the money (R.T. 81, 91). Rassmussen and Petitioner divided up the money, and Petitioner carried approximately $160,000, and Rassmussen carried the remainder, approximately $100,000, when they returned to the

San Francisco Bay Area late on September 21, 1973. On the advice of John Dougherty, a tax preparer and accountant, who Petitioner and Rassmussen had previously consulted concerning the opening of an offshore trust and corporation in the New Hebrides, Petitioner and Rassmussen deposited the money in a Wells Fargo Bank under Rassmussen's name for a bank-to-bank transfer to the New Hebrides (R.T. 111-116).4/

4/ During July or August, 1973, Petitioner sought the advice of Steven Keeler, an officer of the Bank of the Orient, who handled Martin Technologies accounts concerning the feasibility of transferring funds from the United States to a foreign bank account and then bringing the funds back into the United States (R.T. 188-189). According to Keeler, Petitioner stated this procedure was necessary to "clean up" the funds of an unnamed prospective investor in MTI, because the investor had not paid taxes on the money. Therefore, the funds had to be handled in such a way so that the investor could not be traced as the source of the funds (R.T. 189). Keeler informed Petitioner that there was no way in which this could be legally done. Later, sometime in September, 1973, Petitioner informed Keeler that the Wells Fargo Bank could handle the transfer of the funds in a manner which would accomplish the objectives in appellant's initial conversation with Keeler (R.T. 192). In a subsequent conversation, Petitioner informed Keeler that "they had been caught with the money" and that the money "was Mr. Madonna's money" (R.T. 193-194).

Rassmussen, Petitioner, and Petitioner's son then flew to the New Hebrides to await the arrival of the money to fund the New Hebridean trust and corporation which Dougherty had set up (R.T. 117). The money, however, never arrived, because agents of the Internal Revenue Service terminated Rassmussen's taxable year and seized the funds before the money left the Wells Fargo Bank (R.T. 213-214). Petitioner and Rassmussen returned to the United States, where they were questioned by agents of the Internal Revenue Service. Thereafter, Petitioner was extremely nervous and indicated to members of the management group that he was fearful of his own legal liability, and also believed that Mr. Madonna was going to hold him personally responsible for the loss of the money (R.T. 39-40). Petitioner further indicated to members of the management group that he was seeking sources to replace the seized funds, and that in connection with

this, he had contacted an old family friend, Dorothy Smalley, who was willing to loan Mr. Madonna money so that Mr. Madonna could meet his commitment to fund Martin Tecnologies, Inc. ("MTI")(R.T. 39-40). Subsequent to the seizure, Mr. Madonna, who resided in the New York City area, flew to the Bay Area to attend the regular business meetings of MTI. On numerous occasions, members of the management group overheard Mr. Madonna and Petitioner discuss the seized funds. According to the members of the management group, Mr. Madonna repeatedly chastized Petitioner for having "lost" Mr. Madonna's money (R.T. 45). Mr. Madonna also instructed Petitioner to attempt to retrieve from Rassmussen those portions of the funds which the Internal Revenue Service had released to Rassmussen (R.T. 157-158). Petitioner was overheard informing Mr. Madonna that Rassmussen intended to keep all of the money and according to members

of the management group, this made Mr. Madonna furious (R.T. 159-160). After Petitioner received a subpoena ordering him to appear before the grand jury, members of the management group overheard Mr. Madonna tell Petitioner not to tell the grand jury anything (R.T. 48). When Petitioner stated that he couldn't jeopardize himself by refusing to answer the grand jury's questions, members of the management group overheard Petitioner and Mr. Madonna discuss "a consistency of statements if any statements were made" (R.T. 48-49). When Petitioner returned from his grand jury appearance in July of 1974, he informed members of the management group that he had testified truthfully before the grand jury but that the grand jury had not asked him "a lot of questions which might have been material" (R.T. 61).

REASONS FOR GRANTING THE WRIT

IN LIGHT OF THE UNDISPUTED EVIDENCE THAT PETITIONER WAS NOT PRESENT WHEN

RASSMUSSEN OBTAINED THE MONEY AND THAT RASSMUSSEN NEVER INFORMED HIM FROM WHOM HE OBTAINED THE MONEY, THERE WAS NO EVIDENCE INTRODUCED THAT PETITIONER'S ANSWER WAS ANYTHING OTHER THAN THE LITERAL TRUTH

Count Two of the indictment in the instant case reads as follows:

> "On or about July 18, 1974, the defendant, Russell W. Matthews, appearing as a witness under oath before said grand jury, did willfully and knowingly testify falsely with respect to the aforesaid matters as follows:
>
> Q. Do you know where Mr. Rassmussen got that money?
>
> A. No."

The evidence at trial, taken in the light most favorable to the government,[5/] as it relates to this issue, was that Petitioner and Donald Rassmussen flew to New York where they registered in the Alrae Hotel. The following day, Petitioner returned to the room where Rassmussen showed him an attache case containing $260,000

[5/] Glasser v. United States, 315 U.S. 60 (1942).

in currency (R.T. 76). Petitioner did not ask, nor did Rassmussen volunteer, the identity of the person who had given Rassmussen the attache case (R.T. 81).

Petitioner's contention herein, as it consistantly has been throughout the course of the case is that in light of the above undisputed facts, the question which formed the basis for Count Two was reasonably susceptible to two interpretations. It could be construed as meaning "do you know the identity of the person who has a proprietary interest in the money?": The question could equally reasonably be construed as meaning "do you know the identity of the person who delivered the money to Rassmussen?". Because the question was ambiguous in the light of the undisputed evidence that Petitioner was not present when the money was delivered to Rassmussen and that Rassmussen never informed Petitioner of the identity of the person who delivered the

money to him, the government failed to prove that Petitioner's answer was anything other than the literal truth. This is so because while Petitioner may have understood that the government's questioner sought answers about Matthew Madonna's ownership interest in the money, Petitioner may also have realized that the question could fairly be interpreted as calling for information about the identity of the person who delivered the money to Rassmussen. Petitioner might have chosen, therefore, to answer unresponsively to the questioner's intent (i.e. Mr. Madonna's ownership interest in the money), yet as to the identity of the person who delivered the money to Rassmussen, truthfully. Under this eminently reasonable view of the facts, the prosecution failed to prove that Petitioner's answer was anything other than the literal truth, regardless of whether it may have been unresponsive to the question and deli-

berately misleading by negative implication. It is well established that a witness may not be convicted of perjury for an answer which is literally true, even though the answer is unresponsive to the question and is misleading. Bronston v. United States, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1972); United States v. Cook, 489 F.2d 286, 287 (9th Cir. 1973); United States v. Kehoe, 562 F.2d 65 (1st Cir. 1977); United States v. Slawik, 548 F.2d 75, 84 (3rd Cir. 1977).[6/]

In Bronston, the defendant was the sole owner of a motion picture production company, which petitioned for an arrangement with creditors under Ch. XI of the Bankruptcy Act. At the hearing to determine the nature and location of the company's assets, the following questions were asked of Bronston

6/ Appellant did not concede at trial that his answer was intended to deceive his interrogator (R.T. 256). He retains this position before this Court.

and answers given by him:

> "Q. Do you have any bank accounts in Swiss Banks, Mr. Bronston?
>
> A. No, Sir.
>
> Q. Have you ever?
>
> A. The company had an account there for about six months, in Zurich." 409 U.S. at 354.

As a matter of fact, Bronston did at one time have a personal Swiss bank account, but no longer maintained the account as of the time of his testimony (409 U.S. at 354-355). On the basis of his answer to the second question, Bronston was successfully prosecuted for perjury. The Court of Appeals for the Second Circuit affirmed his conviction upon the theory that "for the purposes of 18 U.S.C. §1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury." United

States v. Bronston, 453 F.2d 555, 559 (2d Cir. 1973). In reversing Bronston's conviction, the Supreme Court held that:

> "The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner - so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." Bronston v. United States, supra, 409 U.S. at 360.

The Court specifically stated that the remedy for evasive and misleading, yet truthful answers lies not in a perjury prosecution, but in increased acuity in the examiner's questions.

> "It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard, who dissented from the judgment of the of the Court of Appeals, that any special problems arising to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Id., 409 U.S. at 362.

Bronston was held by this Circuit to be controlling in the United States v. Cook, supra. In Cook, the defendant was indicted for perjury for having given false testimoney in his answers to the following questions, asked during a grand jury investigation into gambling and racketeering activities in Seattle, Washington:

> "Q. Do you have any knowledge of law enforcement officers being paid by operators of gambling establishments?
>
> A. No, I do not.
>
> Q. You don't have any knowledge of anybody currently on the force who participated in shakedowns?
>
> A. I do not."

Cook's conviction was initially upheld by a panel of this Court with Judge Ely dissenting. United States v. Cook, 497 F.2d 753 (9th Cir. 1972). In his dissent, Judge Ely argued:

> "I do not think it proper to indict and prosecute an individual for perjury when the questions forming the basis for the charge are so vaguely and inarticulately phrased by the interrogator as to require the jury to probe the inner workings of the accused's mind to seek to ascertain which of several plausible meanings he attributed to the ambiguous inquiries when he gave the allegedly perjurious responses." United States v. Cook, supra, 497 F.2d at 773.

Shortly after the opinion in Cook was issued, the Supreme Court handed down its decision in Bronston. This Court of Appeals for the Ninth Circuit recalled its decision and remanded the case to the District Court for consideration in the light of Bronston. The District Court did not disturb its original judgment of conviction, and Cook again appealed. This time, the Court of Appeals for the Ninth Circuit reversed and held as follows:

> "After a careful analysis, we are unable to draw a meaningful distinction between the response to the ill phrased question before us, and the unresponsive answer to the question in Bronston. Fairly interpreted, Bronston stands for the precept that a perjury conviction cannot be based on answers which are literally true, even though false information is conveyed by implication." United States vs. Cook, supra, 489 F.2d 286, 287 (9th Cir. 1973).

In the instant case, the government devoted all its prosecutorial efforts to attempt to prove that Petitioner knowingly lied in response to the question because Petitioner knew that the money was the property of Matthew Madonna and that Petitioner was aware of that fact when testifying before the grand jury in July, 1974. To this end, the government produced testimony which sought to prove that the money which was in question was the property of Matthew Madonna; that Madonna wanted to hide his ownership interest in the funds because he (Madonna) had not paid tax on the money; that Petitioner and Rassmussen had placed the money into a Wells Fargo Bank account in Rassmussen's name for transfer to a bank in the New Hebrides where a trust and corporation would be established and funded with the money; that the trust would make a loan to the New Hebridean corporation which in turn would loan the money to MTI,

thus shielding Mr. Madonna's ownership interest in the money; that after the money had been seized by agents of the Internal Revenue Service and Petitioner subpoenaed to appear before a federal grand jury, Madonna and Petitioner had discussed keeping Madonna's ownership interest secret; and therefore when asked the question which formed the basis for Count Two of the indictment, Petitioner had knowingly lied when he answered "no" because he well knew the money was the property of Matthew Madonna. Petitioner does not contend that the evidence is insufficient to prove these facts.

However, Petitioner's testimony that he was not present when Rassmussen obtained the money, and that Rassmussen never informed him of the identitiy of the person who delivered the money to Rassmussen, was undisputed. During closing argument, the prosecution conceded this fact (R.T. 250). This

being so, there simply is no evidence that Petitioner's answer to the question "(D)o you know where Mr. Rassmussen got that money" was anything other than the literal truth (i.e., he did not know the identity of the person who physically delivered the money to Rassmussen). The money could have been delivered by Madonna; it could also have been delivered by a courier whose identity was unknown to Petitioner. In any event, because the undisputed evidence showed Petitioner was not present when Rassmussen obtained the money, and that Rassmussen never informed him of the identity of the person who delivered the money to him, the government failed to prove Petitioner's answer was a falsehood.

The problem stemmed from the fact that the question, in light of the evidence, was ambiguous. Yet, the prosecutor never pressed for an answer which was unequivocal. In

holding that an answer which is literally true does not constitute an offense under 18 U.S.C. §1623, even if the answer is deliberately misleading, the Third Circuit put its finger on the defect in the instant case:

> "...if the prosecutor never asks the critical question and never presses for an unequivocal answer, the defendant may not be convicted of false swearing." United States v. Slawik, supra, 548 F.2d at 84. See also United States v. Tonelli, 577 F.2d 194 (3rd Cir. 1978).

Thus, even accepting the prosecution's theory of the case, the prosecutor failed to ask the critical question (i.e., he did not ask Petitioner whether he knew that the money was the property of Matthew Madonna). Petitioner may have understood quite clearly that the government's interrogator wanted answers about Madonna's proprietary interest in the money. But Petitioner may also have realized that the question could fairly be interpreted as

asking for information about the identity of the person who delivered the money to Rassmussen. He might have chosen, therefore, to answer unresponsively, yet as to the identity of the person who delivered the money to Rassmussen, truthfully. Taking this very plausible view of the facts, the prosecution did not prove, beyond a reasonable doubt or otherwise, that Petitioner's answers were knowing falsehoods, an essential element of 18 U.S.C. §1623.

The Court of Appeals ruled that the instant case was controlled by its decision in United States v. Cash, 522 F.2d 1025 (9th Cir. 1975) not by the Bronston and Cook rationale. In Cash a divided panel upheld a §1623 conviction against the contention that the question upon which the indictment was based was subject to two interpretations. Because the government had not introduced any evidence to establish that under one

interpretation the answer was false, Cash argued that his case was controlled by Bronston v. United States, supra, and United States v. Cook, supra. Judges Wallace and Voorhees approached the issue from the standpoint of inquiring whether the evidence established that Cash knew the question called for the interpretation which the government had proven was false. 522 F.2d at 1028-1029. If so, then he was guilty of false swearing.

Judge Ely dissented on the grounds that the majority opinion "cannot be reconciled with the teachings of Bronston v. United States, [citations omitted] and United States v. Cook," [citations omitted]. 522 F.2d at 1030-1031.[7/]

7/ Judge Ely wrote the dissent in the first Cook decision. 497 F.2d at 762. In reversing itself, the court in the second Cook opinion acknowledged that it was adopting the reasoning set forth in Judge Ely's dissent. 489 F.2d at 287.

Petitioner adopts the reasoning of Judge Ely's opinion and because the undersigned cannot improve upon the language used therein, will simply paraphrase it to conform to the facts of the instant case.

> "Before a grand jury, Matthews was asked whether he knew where a certain Rassmussen had gotten a sum of money. Matthews responded that he did not. It is beyond doubt that the question asked of Matthews was fairly susceptible of two interpretations. The question can be read as inquiring as to whether Matthews knew the identity of the person who had the proprietary interest in the money which Rassmussen had received, but it also could be interpreted as asking as to whether Matthews knew the identity of the person who had delivered the money to Rassmussen.

> The Government's evidence against Matthews proved only that he knew the identity of the person who had the proprietary interest in the money which Rassmussen received. I have searched the record in vain for any proof whatsoever that Matthews knew the identity of the person who delivered the money to Rassmussen.[8/] Since Matthews could reasonably have interpreted the question as being an inquiry about the identity of the person who delivered the money to Rassmussen, and since the Government offered no proof that Matthew's answers, as they related to the identity of the person who delivered the money to Rassmussen, were false, the judgment of conviction should be reversed.

[8/] In the instant case the prosecutor admitted during closing argument that there was no evidence as to the identity of the person who delivered the money to Rassmussen (R.T. 250).

After reviewing the transcript of the trial proceedings, however, the court has concluded that Matthews knew that the prosecutor was asking about the person who had the proprietary interest in the money. On this basis, the court assumes that Matthew's answer related to the person who had the proprietary interest in the money and concludes, therefore, that Matthews committed perjury. I submit that the court's logic is flawed.

Matthews may have understood quite clearly that the Government's interrogator wanted answers about the identity of the person who had the proprietary interest in the money. But Matthews may also have realized that the questions could fairly be interpreted as asked for information about the identity of the person who delivered the

money to Rassmussen. He might have chosen, therefore, to answer unresponsively, yet as to the identity of the person who delivered the money to Rassmussen, truthfully. Taking this very plausible view of the facts, the prosecution did not prove, beyond a reasonable doubt or otherwise, that Matthew's answer was a knowing falsehood, an essential element of the alleged crime. See 18 U.S.C. §1623 ("whoever...knowingly makes any false material declaration...shall be fined ...or imprisoned.")

In Bronston, the Supreme Court expressly noted that the answer for which Bronston was prosecuted might not have been "guileless" and that, in fact, the answer might have been "shrewdly calculated to evade." 409 U.S. at 362, 93 S.Ct. 595. Yet the

Court reversed Bronston's conviction because the Government had not proved his answer to have been knowingly false. Like the panel had done here, the Second Circuit had examined the transcript of Bronston's trial and affirmed his conviction after concluding that he fully understood that his examiner was questioning him about his personal bank accounts, not those of his corporation. United States v. Bronston, 453 F.2d 555, 558 (2d Cir.), rev'd, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973)."

CONCLUSION

The Court of Appeals' decision is in conflict with this Court's decision in Bronston v. United States, supra, and a Writ of Certiorari should therefore issue.

DATED:

Respectfully submitted,

RICHARD B. MAZER
San Franciscan Penthouse
1231 Market Street
San Francisco, CA 94103
Telephone: (415) 552-6500

Attorney for Petitioner
RUSSELL W. MATTHEWS

(Appendices Follow)

APPENDICES

"A" - Opinion of the United States of Appeals for the Ninth Circuit, dated December 21, 1978

"B" - Order of the United States Court of Appeals for the Ninth Circuit, denying Appellant's Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc, dated: February 1, 1979

"C" - Constitutional and Statutory Provisions relied upon

FILED December 21, 1978

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-1488
	)	
-vs-	)	OPINION
	)	
RUSSELL W. MATTHEWS,	)	
	)	
Defendant-Appellant.	)	
	)	

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and SNEED, Circuit Judges, and LINDBERG,* District Judge

MERRILL, Circuit Judge:

Matthews appeals his conviction of willfully and knowingly answering a question falsely before a grand jury in violation of 18 U.S.C. §1623. He argues that the question was susceptible of two interpretations under one of which his answer was not proved to be false.

* Honorable William J. Lindberg, Senior United States District Judge of the Eastern District of Washington, sitting by designation.

The grand jury was investigating whether money derived from racketeering activities had been invested in enterprises engaged in interstate commerce. Appellant was questioned about $260,000 in cash that he and one Rassmussen had brought from New York to California. Appellant testified that he had obtained the money carried by him from Rassmussen. The following question and answer form the basis for the charge of perjury:

"Q. Do you know where Mr. Rassmussen got that money?

A. No."

In support of its charge that Appellant knowingly and willfully lied, the government presented evidence to the following effect:

In 1973 appellant had been employed by one Madonna and had begun to look for an enterprise in which Madonna could invest between $200,000 and $300,000. Later that year he undertook to obtain capital for a group of promoters which was organizing a corporation for the purpose of manufacturing food processing machinery. In September of that year he arranged for Madonna to come to California and meet with the promoters. Madonna agreed to invest $250,000 for a two-thirds interest in the corporation. Ten days later appellant told one of the promoters he was going to New York to get the money from Madonna. On September 18 he flew to New York with Rassmussen. On September 20 Rassmussen showed appellant a briefcase containing $260,000 in $100 bills. The two returned to California with the money.

Prior to leaving California for New York appellant and Rassmussen inquired of officers

of two different banks as to whether large sums of money could be transferred to New Hebrides so that the source of the funds could not be traced when they were later returned to the United States. When the money was brought to California it was deposited in bank accounts in Rassmussen's name, and appellant and Rassmussen then flew to New Hebrides to await its arrival. It was, however, seized in the United States by the Internal Revenue Service.

The government asserts that in the light of all circumstances it must have been clear to appellant that the question in issue sought to ascertain the source of the money. Other portions of appellant's testimony before the grand jury support the government's position.

"Q. Did [Rassmussen] say who he was going to get [the money] from?

A. No***.

Q. You don't know whether it was a legitimate source or illegitimate source?

A. No***.

Q. From whom did [Rassmussen] propose to arrange the financing?

A. I don't know. The loan was to come from him.

Q. Did he make any reference as to the source?

A. No."

Appellant, on the other hand, contends that the question that he is charged with answering falsely can be construed as an inquiry as to the person from whom Rassmussen physically received the money. Appellant contends that since the question could be construed in this fashion, and since the government has presented no evidence that the question so construed was answered falsely, he must, as matter of law, be acquitted under Bronston v. United States, 409 U.S. 352 (1973), followed by this court in United States v. Cook, 489 F.2d 286 (9th Cir. 1973). We disagree.

In Bronston the answer given was perfectly true, but it was unresponsive to the question asked. The testimony was: "Q. Do you have any bank accounts in Swiss banks Mr. Bronston? A. No, sir. Q. Have you ever? A. The company had an account there for about six months in Zurich." Bronston actually had had a Swiss bank account at one time in the past and the government contended that the unresponsive answer was false by implication. The Supreme Court rejected this, stating:

> "[T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner--so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry."

409 U.S. at 360.

This holding, however, is of no assistance here. The answer here was not unresponsive. It was a forthright "no." It

was not, as in Bronston, a statement of fact the truth of which could be ascertained without reference to the question that elicited it.[1] Here the answer cannot be separated from the question if the truth of the answer is to be determined. If the "no" is to have meaning it must be read to echo and negate the language of the question itself: "I do not know where Mr. Rassmussen got the money." The problem presented here, which was not presented in Bronston, is that the question asked of appellant is asserted to be subject to two different meanings.

If language in which a question is couched is plausibly subject to two interpretations, that language contains within it two different questions. Appellant contends, relying upon United States v. Cook, supra, that under these circumstances, if the answer is to be proved false it must be proved false as to both questions. He contends that since it was not proved false under the interpretations he advances (i.e., since it has not been proved that he knew who had physically delivered the money to Rassmussen), he has not been proved guilty of perjury.[2]

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[1] Had appellant wished to "derail the questioner," as in Bronston, he should have answered the question, "I do not know who actually handed him the money."

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[2] This assumes that the interpretation advanced by appellant is a plausible one. As we note later, this is a question upon which we entertain great doubt.

In United States v. Cash, 522 F.2d 1025 (9th Cir. 1973), this court approached the problem from a different angle. There it was held that the critical inquiry is as to the meaning attached to the question by the accused. We stated:

> "In the instant case the questions asked of the appellant before the grand jury raise this problem: Did appellant understand the word 'seller' in the questions asked of him before the grand jury to mean 'Jack Bishop' (the purported seller) or did he understand the word 'seller' in those questions to mean the individual, unknown to him, who was the actual seller of the Postal Service Bonds? If appellant construed the word 'seller' to mean Jack Bishop, his conviction must be affirmed. If he construed the word 'seller' to mean that individual who was the actual seller of the bonds, then his conviction must be reversed."

522 F.2d at 1028-29: We concluded:

> "A careful reading of the record has convinced us beyond any doubt that appellant knew that he was being asked about his knowledge of Jack Bishop when he was being questioned before the grand jury and that the word 'seller' in the questions was understood by him to mean Jack Bishop."

Id. at 1029. We held that it was proper under these circumstances to give the issue to the jury. The result is to place on the prosecution the burden of proving beyond a reasonable doubt that the defendant understood the question as did the government and

that, so understood, the defendant's answer was false.

In Cash we took note of our earlier decision in United States v. Cook, supra, in which this court overturned a jury guilty verdict and ruled as matter of law that the government had failed to make out a case of perjury. While a distinction was not expressly drawn, we appeared, in Cash, to distinguish Cook on the facts. The history of Cook casts light on the scope of its holding. The questions there asked of Cook were:

> "Q. Do you have any knowledge of law enforcement officers being paid by operators of gambling establishments?
>
> A. No I do not.
>
> Q. You don't have any knowledge of anybody currently on the force who participated in shakedowns?
>
> A. I do not."

The record established that kickbacks to police officers had ceased two years before Cook was questioned. Cook contended that the questions were directed to the present and that so understood his answers were truthful. The government contended that the questions referred to present or past and that, as to the past, the answers were false. The Cook panel originally affirmed the conviction, with Judge Ely dissenting. 497 F.2d 753 (1972). After the decision in Bronston came down, the court reconsidered its decision and reversed itself. 489 F.2d 286 (1973). Reading the final opinion in

the light of Judge Ely's dissent in the original opinion, 497 F.2d at 767, it is clear that the court felt that a grammatical analysis of the questions asked of Cook made impossible any construction other than that advanced by Cook - that the questions referred to the present only. There was not, then, evidence from which the jury could find the defendant guilty beyond a reasonable doubt, and it was proper for this court, as matter of law, to find that the prosecution had failed to meet its burden and that the defendant was entitled to acquittal.

The case before us is a Cash case rather than a Cook case. Here, as in Cash, the government's construction of the question was plausible and a jury issue was presented as to the defendant's understanding of the question. There is ample evidence from which the jury could conclude beyond a reasonable doubt that appellant understood the question asked of him as pursuing the same inquiry into the source that was explicitly made the subject of other questions asked in the course of the same interrogation. Indeed, we do not see how the question could rationally be given any other meaning. We conclude that appellant was not entitled to an acquittal as matter of law; that the question of guilt remained one for the jury.

Affirmed.

FILED February 1, 1979

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 78-1488
-vs-	)	O R D E R
RUSSELL W. MATTHEWS, Defendant-Appellant.	)	

Before: MERRILL and SNEED, Circuit Judges, and LINDBERG, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Sneed has voted to reject the suggestion for rehearing en banc and Judges Merrill and Lindberg have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX "C"

CONSTITUTIONAL AND STATUTORY

PROVISIONS

18 U.S.C. §1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

CERTIFICATE OF SERVICE

I, RICHARD B. MAZER, certify as follows:

My business address is 1231 Market Street, San Franciscan Penthouse, San Francisco, California.

On February 28, 1979, I served the within Petition for Writ of Certiorari by placing three true copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on February 26, 1979 at San Francisco, California.

RICHARD B. MAZER